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DECLARATION CONCERNING PROFESSIONAL ETHICS RECENTLY ADOPTED BY THE STATE BAR ASSOCIATION OF CONNECTICUT.

On February 7th, 1910, the State Bar Association of Connecticut, at its annual meeting, unanimously adopted the report of its special committee on the adoption of a Code of Professional Ethics. This action is in step with a general movement in the several States throughout the country, and with the action of the American Bar Association at Seattle in 1908.

Codes of this nature, setting forth in express terms those ethical principles which should guide those who practice law, are not a novelty. Indeed, such formal statements are adopted in many professions, and are, in the main, declaratory of such principles of dealings between practitioners, and with the outside world, as are instinctive to men of the greatest experience, the soundest wisdom, and the highest moral sense. If all men were endowed with these qualities at the beginning of their professional lives, such codes would be of little value, save to indicate to the outside world what standards prevail within the profession, and thereby enhance the confidence in and respect for those who conform to these requirements, and are in good standing in their respective professions.

Unfortunately, however, this is not the case, and many young men come to the Bar lacking the benefits of sound home, social and religious training. Sometimes—though rarely—in such men we find a strong innate sense of right, and of consideration for others, with whom all that may be found in a code of ethics would be intuitive.

The great majority of men—even those who have enjoyed the benefits of the highest training—need, from time to time, to be reminded of the rules, and to measure their purposes and their conduct by them. We might even go further and say that the best and wisest of men are helped by perusing a code in which their highest professional ideals are imbedded.

Many a young man goes astray in professional life, and makes professional mistakes, even though he avoids the grosser temptations. Ignorance is no excuse where such codes as this, if consulted, will furnish a principle for nearly every conceivable case.

The American Bar Association has been at work on this subject for years, and its work has been most thorough, intelligent and painstaking. Its committees were made up of some of the most eminent men of the country, and they studied their subject for years. Tentative codes were drafted, from time to time, and submitted to a large number of judges and lawyers, and their opinions were finally published in a large volume for final use in drafting the code. This code has, since its adoption, been, in many different ways, presented to the public and the profession, and is readily accessible. It was at first thought that this code might well be adopted in every State of the Union without alteration, and that in this way another long step in the direction of uniformity in the law might be taken. To the Connecticut committee, however, of which Judge Hamersley, lately of the Supreme Court, was the head, it seemed that in some minor respects the code was not in strict conformity with our professional ideas. It seemed, also, that questions of mere professional courtesy and etiquette might well be separated from the more serious questions involving moral obliquity; and it further seemed that a slight change in arrangement might be of advantage.

The Connecticut code, however, in no essential respect differs—save by some omissions—from that of the American Bar Association. Indeed, the Committee says: "We have included in the draft substantially all the Canons of the American Bar Associa-

tion, using for the most part the same language; and have grouped under separate headings the more distinctly ethical rules, the rules of professional etiquette, and those affecting the lawyer in his relation to the public." The code reported by the Committee consists of a preamble, and a "Declaration Concerning Professional Ethics," which are set forth in twelve pages. A copy of the report has been sent to each member of the Connecticut Bar, whether or not a member of the Association, and copies may be had through the Secretary of the Yale Law School.

The interesting and instructive article in the last number of this JOURNAL, by Dean James B. Brooks, of the College of Law, Syracuse University, is well timed, and especially in view of the suggestion of the committee that the rules of Court or the regulations of the State Bar Examining Committee be modified "for the purpose of securing an adequate understanding by those admitted to the Bar of the principles and recognized rules of professional ethics." How this understanding shall be evidenced has not yet been determined.¹

That the students at this school have enjoyed lectures on legal ethics, from a most eminent authority on the subject, is a matter for congratulation, but it is plain that to the men who most need this instruction something more than a lecture course is requisite, and that the rules should be before them, in tangible form, to be read and mastered. Whether or not such action be taken by the School, or the Examining Committee, no man can afford to enter, or to remain a member of, the Bar of any State, without familiarizing himself with those rules, regulations and requirements which the highest ideals of the profession demand. That these standards are lofty is true; that they cannot be attained at all times by any man throughout his professional career may be true; but it is none the less true that none but the highest conceivable standards should satisfy our profession, and that every man should strive toward them with what strength he has.

G. D. W.

¹ Since this note was written, the State Bar Examining Committee of Connecticut, at a special session, has taken action in this matter, and will require—beginning at the June examination, 1911—an examination on the Connecticut "Declaration Concerning Professional Ethics" referred to above; the Connecticut Attorney's Oath; and Sharswood's "Legal Ethics."

LIABILITY TO A BONA FIDE PURCHASER ON A STOLEN CHECK.

In *Capital City Bank v. Huffman* (date of decision not reported), the Intermediate Court of Marion County, West Virginia, handed down a decision of more than usual interest. The facts, briefly stated, were as follows: The defendant gave to his brother a number of checks on the E Bank signed by the defendant with the payee, date and amount left blank; these checks were to be filled up and used in the private business of the brother; one of the checks so signed was stolen, filled up fraudulently and cashed by the plaintiff without notice; the check being sent to the E Bank for payment, it was returned marked "No funds," and the holder sues the maker, the indorser having absconded.

This brings up fairly the question: Is a person who signs a blank check liable to a bona fide holder who takes the instrument from one who has stolen it and fraudulently filled it out? The Court says, yes. We are inclined to the belief that this decision is, to say the least, open to doubt.

We have been unable to find any case directly bearing on this subject. The various possibilities arising from the delivery of a blank instrument to an agent have practically all been in the Courts except this one. So, we can only base our conclusions on analogies. When a blank instrument is delivered to an agent (1) he may fill it out and use it as directed; or (2) he may fill in the blanks with a sum in excess of his authority; or (3) he may fill it out with the authorized sum, but be negligent in so doing so that it may be changed; or (4) it may escape from his possession while still incomplete.

It is evident that, by the rules of agency, if he fills it out as directed, the principal will be liable on the instrument as completed. And it has been repeatedly held that if he fills it out in excess of his authority the principal will be held. This is on the ground of implied authority. *Tiedman Commercial Paper*, Sect. 283; *Bigelow, Estoppel*, 495. See also *Russell v. Langstaff*, 2 Dougl. 514, where Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum."

On the next possibility the authorities are not entirely in accord. The earliest case on this subject is the English case of *Young v. Grote*, 4 Bing. 253. An agent, in filling out a check,

left blanks in such a way that the amount of the check could easily be changed. This was done and the drawer was held liable to his banker for the amount so paid out. The Court bases the decision on the express grounds of negligence. This case has been criticised by the later cases in England and in this country, and the rule as to leaving blanks in an instrument is now the other way. The fact that spaces were so left in an instrument is not evidence of negligence on the part of an indorser and he cannot be held where they are fraudulently filled up. *Scholfeld v. Loudesborough* (1895), 1 Q. B. 536. In this case, the Court says that the forgery, and not the negligence, was the proximate cause of the injury, and refers to *Young v. Grote* as the "fount of bad argument." A recent case in New York reviews the authorities and reaches the conclusion that the weight of the American decisions is in favor of the later English cases, and that the leaving of a blank space is not evidence of negligence. The Court says that the only theory upon which the indorser could be held to be liable (and this would apply with equal force to a maker) is that "he is bound to assume that those to whom he delivers the paper or into whose hands it may come, will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law." *National Exchange Bank of Albany v. Lester*, 194 N. Y. 461. And see the note to this case in 21 L. R. A. (N. S.) 402, where the authorities are collected and discussed. The conclusion reached in this note is to the effect that *Bank v. Lester* states the law as supported by the weight of authority. So we can say that the general rule is that, in our third proposition, the principal cannot be held.

Coming now to the situation where the incomplete instrument has escaped from the custody of the agent and has been fraudulently filled up. This might occur either through his negligence or independent of any want of care on his part. And in the case of a check it might lead to a fraud either on the drawee bank or on a bona fide holder.

It has been held that where a blank check has been stolen and filled up by an unauthorized person, if this check is paid by the drawee bank, the drawer is liable to the bank. But this is because of the peculiar relation of banker and depositor. *Snodgrass v. Sweetzer*, 15 Ind. App. 682; *Trust Company of America v. Conklin*, 119 N. Y. Supp. 367. The bank is compelled to know the signature of its depositor, and if it is satisfied that the signa-

ture is good, it need look no further. The fact that the body of the check is in different handwriting is no notice of irregularity. See Daniel *Negotiable Instruments*, Sect. 1054a, and cases cited.

The question of the liability to a bona fide holder of an instrument of this kind seems to have been a favorite subject of discussion for a great many years, and it is surprising that it has never been settled by the Courts. In *Swan v. The North British Australasian Company*, 2 H. & C. 175, Justice Blackburn says, by way of dictum: "It is sufficient to point out that a party signing in blank, a check or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders. . . . He means the holder to be induced to take the instrument as if it had been filled up from the first." He thinks the maker would be liable on the ground of estoppel. An eminent text-writer expresses the view that the bona fide purchaser could recover from the maker. Morse on *Banks and Banking*, Vol. II, Sect. 486. The reasoning whereby he reaches this conclusion is not set forth, however.

In *Putnam v. Sullivan*, 4 Mass. 45, the defendants indorsed several blank notes and left them with their clerk, from whom the note in suit was obtained by fraud, and filled out. It reached the hands of a bona fide holder and he was allowed to recover. But in that case the clerk was guilty of negligence.

In *Baxendale v. Bennett*, 47 L. J. Q. B. 624, the defendant had signed a bill of exchange as acceptor. The name of the drawer had been left blank, and the bill was, in this condition, stolen from his desk. A drawer's name was forged and the bill came into the hands of a bona fide purchaser. The Court held that the defendant was not liable, even though he might have been negligent in leaving the note lying around in this incomplete condition, because this negligence was not the proximate cause of fraud. *Tedwick v. McKim*, 53 N. Y. 307, is to the same effect. Lord Justice Bramwell, in *Baxendale v. Bennett*, *supra*, expresses his opinion, by dictum, that the bona fide holder of a check that had been signed in blank and stolen could not recover.

In *Trust Co. of America v. Conklin*, *supra*, the Court says: "We may for the purposes of this appeal dismiss entirely the question whether the defendant would be liable to a bona fide holder for value. The question before us is entirely one con-

cerning the duties of a depositor to his bank. That a depositor owes a real duty to the bank has been frequently decided, and this duty is greater than that which the maker of an instrument owes to subsequent holders for value. A purchaser of a negotiable instrument can take it or not at his option, and usually, at least to some extent, relies on the responsibility of the last holder. A bank, however, must at its peril pay out the money deposited, if the depositor directs him to do so. . . . If the defendant is liable at all, it is because he owed the bank a duty which he violated by signing the check in blank."

Under the doctrines laid down by these decisions, it would seem that the mere act of delivering the blank check to the agent was not negligence *per se*. "There can be no negligence where there is no duty." *Bank v. Lester, supra*. According to the theory expressed in that and other cases cited, the maker need not presume that somebody will fill up these checks fraudulently or criminally. Hence, there can be no duty on him which would forbid the delivery of the checks to the agent. The theft and forgery was the proximate cause of the fraud, and he need not foresee that as against a subsequent bona fide purchaser. In the case of a check more than any other instrument, the taker relies on the credit of the last holder and assumes the risk of a forgery or other irregularity in the check. Circumstances might arise where negligence could be shown on the part of the agent in allowing the checks to escape from his custody, and in this case the holder might recover as in *Putnam v. Sullivan, supra*; but, in the absence of such circumstances, we are inclined to think that the maker would not be liable.

JURISDICTION OF COURTS IN CASES OF INJURY TO REAL PROPERTY.

A railroad car containing nitroglycerine exploded in Kentucky near the boundary line between that State and Tennessee and destroyed property in both States. A property owner in Tennessee sued for damages in the Kentucky County Circuit Court. That Court dismissed the action on the ground that it was a local action and must be brought in the jurisdiction in which the injured property is situated. The Kentucky Court of Appeals, however, reversed the County Court and held that the action was maintainable, notwithstanding the fact that the injured property was without its jurisdiction. *Smith v. Southern Ry. Company*, 123

S. W. 678. The Court of Appeals held that since the explosion in Kentucky, caused by the negligence of the defendant, instantaneously destroyed the house of the plaintiff situated only a few yards away, in Tennessee, the action could be maintained in either State.

This is the first case of its kind in Kentucky and it seems that there are very few similar cases in the country. Consequently it cannot be said that there is any weight of authority on the subject, though many courts are inclined to adhere strictly to the common law distinctions between local and transitory actions.

That the wrongdoer may be sued where the injured property is situated is well settled, even though the cause of the injury arises in another county. *Thompson v. Crocker*, 9 Pick (Mass.) 61. And the action may be maintained even when part of the plaintiff's land lies in the same State in which the cause of the injury existed. *Ruckman v. Green*, 9 Hun. (N. Y.) 225. Where a nuisance extends from one jurisdiction into another, a Court of Equity within whose jurisdiction the nuisance exists will grant relief by injunction. *Stillman v. White Rock Mfg. Co.*, Fed. Cas. No. 13,446.

At one time Lord Mansfield and Lord Chief Justice Eyre allowed suits at law to be maintained in England for injuries done by pulling down houses in Nova Scotia and Labrador, but the doctrine has since been overruled as untenable. *Story on Conflict of Laws*, p. 772. The earlier weight of authority in this country seems to have been that all actions for injuries to real property were local and had to be brought in the jurisdiction where the injured property was situated, even though the cause of the injury was elsewhere. *Eachus v. Trustees of Ill. and Mich. Canal*, 17 Ill. 534; *Howard v. Ingersoll*, 23 Ala. 673; *Watts v. Kinney*, 6 Hill (N. Y.) 82.

The Kentucky Court cites as one of its strongest authorities *Thayer v. Brooks*, 17 Ohio St. 489, which is a curious evidence as to the basis upon which judicial legislation is sometimes founded. In that case the cause of the injury was in Pennsylvania, and the plaintiff, whose property was situated wholly in Ohio, was allowed to maintain his action in Ohio under the authority of *Eachus v. Trustees, etc.*, and *Watts v. Kinney, supra*. The Ohio Court then went one step further and said that the action could

be maintained in either State, citing for its only authority, *Chitty*, Pleading 299, which has also been cited in nearly every other case on this point. The only case that Chitty cites to uphold his assertion that the venue may be laid in either jurisdiction is *Sutton v. Clarke*, 6 Taunt. 29, which does not sustain him at all for the reporter drew up his syllabus from the arguments of the attorneys instead of from the decision of the Court. Consequently the Ohio Court practically cited nothing to sustain its statement which, after all, was mere *obiter dictum*.

Notwithstanding this lack of solid foundation, the doctrine laid down in Chitty, and followed in the case at hand, seems to have become a settled doctrine so far as it refers to counties. *Barden v. Crocker*, 10 Pick. (Mass.) 383; *Pilgrim v. Mellor*, 1 Ill. App. 448; *Ohio, etc., R. R. Co. v. Combs*, 43 Ill. App. 119.

There is yet the question whether this doctrine can be applied to sovereign states. So far as we can ascertain there are only two other cases in this country, besides the present case, which bear directly on this point. In *Rundle v. Delaware, etc., Canal*, 1 Wall. Jr. (U.S. C. C.) 275, the defendant's dam in New Jersey injured the plaintiff's property in Pennsylvania, and it was held that the action could be maintained in the Circuit Court of the United States in New Jersey, because the State of New Jersey "formed one county" so far as that Court was concerned. The Texas Court quoted the U. S. Circuit Court in *Armendiaz v. Stillman*, 54 Texas 623, where an action was brought in Texas for injury to land in Mexico caused by a dam in Texas, but the court decided the case on the ground that the common law had been superseded in Texas by statute and therefore the action was maintainable. Quoting Chief Justice Marshall it said further that without legislative aid the Courts have applied the "fiction upon which transitory actions are sustained" to personal torts wherever the wrong may have been committed, and to all contracts wherever executed. To this general rule, contracts respecting lands form no exception, and, though an investigation of the title may be necessary or a question of boundary arise, yet these difficulties have not prevailed against the jurisdiction of the court.

Therefore, in view of these two decisions, and the fact that there seems to be no great distinction between the comparative jurisdictions of States and Counties, the Kentucky Court should be commended for its decision even though it may seem to be contrary to the old common law doctrine regarding local actions.

MANDAMUS COMMANDING INSPECTORS OF ELECTIONS TO COUNT
VOTES EXCLUDED BY MISUNDERSTANDING OF ELECTION LAW.

In the recent case of the *People of New York ex rel. McLaughlin v. Ammenwerth, et al.*, N. Y. Law J., Vol. 42, No. 103, the Court of Appeals of New York passed upon a point never before decided by that Court and one upon which there appear to be few decisions. The case arose out of the general election of last November for the office of Municipal Court Justice of the Fourth District. After the conclusion of the election, the inspectors canvassed the votes and filed their certificate, as required by law, in the Clerk's office of the County of Queens. Seventeen ballots were protested as being marked for identification and, as required by statute, were so indorsed by the canvassers and placed in a sealed envelope and deposited as required by law. Under the terms of the statute, the inspectors should have counted these ballots leaving their validity to be thereafter determined in a special proceeding taken for the purpose. Acting under a misunderstanding of this election law, however, the canvassers did not count these ballots. This action was brought for a peremptory writ of mandamus directing them to canvass the protested ballots and after the canvass to correct their returns in conformity with the result of such canvass. The Court of Appeals affirmed the order granting the mandamus by a vote of five to two.

Where inspectors and judges of elections have wholly failed or refused to perform their duties in counting the ballots and making returns in accordance with the statute requirements, there is no doubt of the right of the courts to issue a peremptory writ of mandamus ordering them to convene and fulfill the duties of their offices. *People ex rel. Sturtevant v. Armstrong*, 116 N. Y. App. Div. 109; *People ex rel. Smith v. Schiellein*, 95 N. Y. 124; *Taylor et al. v. Kolb*, 100 Ala. 603.

On the other hand, mandamus will not lie, at least in New York, to order an entire recount of the ballots already counted by the inspectors. *Hearst v. Woelper*, 183 N. Y. 284; *Corbett v. Naylor*, 25 R. I. 520. It is a settled principle of the New York Court that the results of an election should be speedily ascertained, the result declared, and certificates of elections upon such declared results issued to those persons who, upon the face of the returns,

have been elected to public office. *People ex rel. Brink v. Way*, 179 N. Y. 174.

The greatest number of cases arise under some variety of circumstance like that in the principal case where the canvassing board has incompletely discharged its duties, either through error or fraud on their part. Considerable difference seems to exist among the various states as to when a mandamus will be granted to compel a board to convene and correct their error.

Some cases have held that when the board has filed its certificate and has dissolved, the matter is wholly out of their jurisdiction and they have become *functus officio*, and despite whatever errors they may have committed, mandamus will not lie to compel them to correct them. If the board has erred the errors must be corrected by some other tribunal, usually in a *quo warranto* proceeding. The office is already filled by a person holding by color of right. *State ex rel. Bland v. Rodman*, 43 Mo. 256; *People v. Supervisors of Greene*, 12 Barb. (N. Y.) 217. On the holding in this latter case, Chief Justice Cullen bases his dissent in the principal case, holding that after an election return has once been made, the same cannot be altered, but the only remedy for error or fraud must be found in *quo warranto*. It appears, however, that neither the decisions of the Court of Appeals of New York nor those of many other jurisdictions justify this expression of opinion as the generally accepted rule.

In *re Stewart*, 155 N. Y. 545, where the New York Court perhaps showed its greatest liberality in granting a mandamus, the Court said: "The theory of a proceeding asking for a peremptory writ of mandamus requiring the inspectors of elections in the districts named to convene and make correct returns of the vote cast in such districts for said officers, is that, inasmuch as the inspectors have through error or otherwise made a false return contrary to their duties under the law, the Court must intervene and authorize, and, if need be, compel them to make a true return. This is wholly independent of the Election Law itself and rests upon the fundamental and elemental principle that every public officer can be compelled by the Court to perform the duties pertaining to his office."

In many other jurisdictions the Courts have shown a willingness to grant mandamus when canvassing boards incompletely

discharge their duties. In *People v. Nordheim*, 99 Ill. 553, the Illinois Court held that *functus officio* does not take effect when canvassing boards have dispersed before having completed the canvass. The office of canvassers being largely ministerial, they will be required to count all the votes and will not be allowed to disfranchise voters by failure to count certain votes through some informality which can be corrected before the canvassers. *People ex rel. Fuller v. Hilliard*, 29 Ill. 413.

In *re Strong*, 20 Pick. (Mass.) 484, the Massachusetts Court said: "Generally in all cases of omissions or mistakes where there is no other adequate specific remedy, resort may be had to mandamus." A board of canvassers had refused to give a certificate of election to an officer elected and had ordered a new election. Mandamus was held to lie to compel the board to give the certificate although the Court admitted that *People v. New York*, 3 Johns Cas. 79, was *contra*. And it could hardly be maintained that the above statement by the Massachusetts Court could be reconciled with the statement of the Rhode Island Court in *Corbett v. Naylor*, *supra*, where that Court said: "The function of a mandamus is to compel the performance of a legal duty, to command action, not to review action. It does not lie to correct mistakes that have been made or to remedy wrongs that have been done or to undo that which has been done." The reasoning in this case agrees somewhat with that of the dissenting justices in the principal case and shows a desire to draw a sharp distinction in legal effect between completing their unfinished duties and correcting the erroneous performance of their duties as a justification for granting a mandamus writ.

A similar decision was reached in *Kisder v. Cameron*, 39 Ind. 488, where the Court authorized a mandamus to compel a board of canvassers to give a certificate to a party elected.

Unless the ballots have been returned to the county clerk and are beyond the control of the board, the Nebraska Courts will issue a mandamus to compel the canvassers who neglect or refuse to fully perform their duty, to discharge that duty. *State v. Dinsmore*, 5 Brown (Neb.) 145; *State ex rel. Waggoner v. Russel*, 34 Neb. 116.

In *Kummel v. Dealy*, 112 Ia. 503, the board of supervisors failed to properly certify and authenticate and refused to permit the judges, who appeared before them at the same session, to cor-

rect any errors. It was held that mandamus would lie to compel the board to permit such correction since it was the only remedy available to complainant voters.

A case clearly opposed to the rule of *The People v. Supervisors of Greene, supra*, is *State v. Gibbs*, 13 Fla. 55, where the canvassing board had met and made its canvass of all the returns of the election which had been received by them on the legal day for proceeding with the canvass, yet, afterwards, other and further returns of the election were received by them, but the board adjourned without including these latter returns in the canvass. A mandamus would have been granted requiring the board to reassemble and complete the canvass of all the returns in their possession but for the fact that the statute had been repealed under which they exercised their authority as canvassers. And in *State v. McCoy*, 2 Marv. (Del.) 576, it was held that the decision of the Florida Court could not be accepted as the law in that jurisdiction and granted a writ of mandamus to compel the canvassers to reassemble when the board of canvassers had failed to properly count the vote, although that portion of the election law under which the board had exercised their authority had been repealed and other officials had been constituted a new board in their place.

It must be remembered that a proceeding under the writ of mandamus does not necessarily determine the ultimate right. Thus, it has been applied when it could determine but one step in the progress of inquiry and when it could not finally settle the controversy, but it might be necessary to resort to *quo warranto*, an injunction, or a contest of election under the statute. *Ex parte Strong, supra*; *People v. Kilduff*, 15 Ill. 492.

From these decisions it would appear that the rule laid down in the principal case was in line with the weight of authority in granting a peremptory writ of mandamus for the purpose of compelling the inspectors of elections to conform to all the provisions of the Election Law in counting the votes.